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- San Bernardino County Transportation Commission   ■ San Bernardino County Transportation Authority
  - San Bernardino County Congestion Management Agency   ■ Service Authority for Freeway Emergencies
- 

## **Support Material for Agenda No. 20**

### **Board of Directors**

**July 7, 2010**

**Location:**

SANBAG Office  
The Super Chief Conference Room  
1170 W. 3<sup>rd</sup> Street,  
San Bernardino, CA

## **DISCUSSION CALENDAR**

### **20. Right-of-Way Services Agreement with Omnitrans for the E Street sbX BRT**

1. Approve Contract No. C10263 between SANBAG and Omnitrans to perform the right-of-way acquisition for the E Street sbX bus rapid transit (BRT) project.
2. Approve budget amendment to increase the FY 2010/2011 budget for Task No. 31511000 Omnitrans in the amount of \$9.9 million, as identified in the Financial Impact Section. **Mitch Alderman**

*Attached is the Agreement with Omnitrans that had not been finalized when the agenda was mailed.*

**COOPERATIVE AGREEMENT C10263  
BETWEEN OMNITRANS AND SAN BERNARDINO COUNTY  
TRANSPORTATION COMMISSION FOR THE ACQUISITION OF  
PROPERTIES FOR THE SBX BUS RAPID TRANSIT PROJECT**

This COOPERATIVE AGREEMENT (“**Agreement**”) by and between OMNITRANS, a joint powers agency established pursuant to Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code (“**Omnitrans**”) and the SAN BERNARDINO COUNTY TRANSPORTATION COMMISSION, established pursuant to Chapter 2 (commencing with Section 130054) of Division 12 of the Public Utilities Code (“**SANBAG**”) and is dated as of June 30, 2010 for reference purposes only (“**Effective Date**”). Omnitrans and SANBAG are sometimes individually referred to as “**Party**” and collectively as “**Parties.**”

**RECITALS**

A. The Omnitrans Board of Directors adopted a Locally Preferred Alternative (“**LPA**”) during its meeting on December 7, 2005, and subsequently adopted the Refined Locally Preferred Alternative (“**RLPA**”) during its meeting on February 4, 2009, for the “E” Street Corridor sbX Bus Rapid Transit Project (“**Project**”). The Project consists of developing sixteen (16) proposed “rapid bus” style stations that will utilize modern articulated buses for quick boarding along a proposed 15.7-mile route, including 5.4 miles of exclusive center-running bus rapid transit (“**BRT**”) lanes within the City of San Bernardino and 10.3 miles of mixed flow lanes, transit signal priority applications at select key intersections to reduce delays and improve time, and four (4) park-and-ride facilities. The Project is partially funded under the Federal Transit Administration Small Starts Program.

B. As currently proposed, the Project offers multiple modality connections to effectuate the goals of the Parties in reducing travel delay and inefficiency, reducing greenhouse gas emissions and promoting transit oriented development, including implementing miles of exclusive lanes along the proposed route to improve competitive operational speeds and the maintenance of design system characteristics, providing transit signal priority at various designated street intersections, where exclusive lanes are not proposed, to enable BRT vehicles to enter mixed-flow traffic more efficiently, and establishing park and ride facilities in conjunction with selected station locations.

C. SANBAG and Omnitrans have the authority, among other things, to acquire interests in real property through negotiated sale.

D. SANBAG also has the authority to acquire interests in real property through exercising its power of eminent domain.

E. SANBAG and Omnitrans believe the activities related to right-of-way acquisition for the Project can be best achieved through this Agreement and both Parties desire to enter into this Agreement to set forth their mutual understanding of the terms and conditions for which SANBAG and Omnitrans will coordinate their joint participation in right-of-way acquisition for the Project.

NOW, THEREFORE, in consideration of the above recitals and the mutual covenants hereinafter contained and for good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

## 1. Terms

1.1 Term of Agreement. This Agreement shall commence on the Effective Date and shall terminate on June 30, 2015, unless earlier terminated as provided in Sections 1.10 or 1.11 below. The obligations of the Parties, which by their nature or description, continue beyond the term of this Agreement and will survive the termination of this Agreement. Notwithstanding the termination date set forth herein, the indemnification provisions and dispute resolution provisions shall survive the termination of this Agreement.

1.2 Right-of-Way Acquisition. Both Parties acknowledge and agree that SANBAG, as the San Bernardino County Transportation Commission, has the power of eminent domain to condemn any property necessary, incidental, or convenient to the exercise of its powers pursuant to Chapter 4 (commencing with Section 130200) of Division 12 of the Public Utilities Code. The Parties further agree that they will coordinate their joint efforts to acquire any right-of-way or any other property necessary for Project development (an “**Alignment Property**”) and agree to SANBAG’s acquisition of any Alignment Property through SANBAG’s exercise of the power of eminent domain. SANBAG shall be responsible for ensuring its compliance with all applicable state and federal laws relating to its acquisition of any Alignment Property, including, but not limited to: (i) Cal Const. art. I, § 19; (ii) the California Eminent Domain Law (Code Civ. Proc., §§ 1230.010 et. seq.); (iii) the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, as amended (42 U.S.C. § 4601 et seq.); and (iv) state relocation laws and the implementing regulations (Gov. Code, §§ 7260 et seq., Cal. Code Regs., tit. 25, §§ 6000 et seq.) (the “**Acquisition Regulations**”).

1.3 Approval of Appraisal Value, Offer of Just Compensation. To the extent that Omnitrans has obtained the following items, Omnitrans shall, as soon as reasonably practicable (it being recognized by the Parties that this information is important for SANBAG to undertake its obligations under this Agreement and that any delay in providing such information will impact the schedule of acquisition of the Alignment Property), provide the following items to SANBAG in order to assist SANBAG in its assessment of the fair market value of an Alignment Property: (i) any independent appraisal of the fair market value of the Alignment Property; (ii) any review of any such independent appraisal of the Alignment Property; (iii) any appraisal report and/or recommendation for establishing just compensation for the Alignment Property based on an analysis of the independent appraisal and/or appraisal-review; and (iv) any title report or commitment relating to the Alignment Property, including copies of all underlying documents, liens and encumbrances listed therein. Based on the foregoing items and, as necessary or appropriate, any additional appraisal, appraisal -review, title report or commitment relating to an Alignment Property that SANBAG orders or performs, SANBAG shall establish what it believes to be just compensation for the Alignment Property, which shall be no less than the most recent appraisal of fair market value for the Alignment Property. All offers shall be based on an appraisal and SANBAG shall be responsible for ensuring that such offers contain all information required under both state and federal law. The foregoing notwithstanding, SANBAG may dispense with the statutory requirement to make an offer prior to its adoption of a resolution of necessity for an Alignment Property should SANBAG fail to locate the owner or owners of that Alignment Property after exercising reasonable diligence.

In the event SANBAG elects to utilize any appraisal report or appraisal information or any other materials generated by any consultant retained by Omnitrans, (i) SANBAG shall be entitled to rely on the accuracy and completeness thereof without independent investigation or confirmation; (ii) SANBAG shall have no liability or responsibility for any inaccuracy, defect, incompleteness or inadequacy of such appraisal reports or appraisal information or any other materials generated by any consultant retained by Omnitrans; (iii) Omnitrans shall bear the sole risk of any such inaccuracy, defect, incompleteness, or inadequacy; and (iv) Omnitrans shall arrange for Omnitrans’ retainer agreement with any such consultant

to be transferred to SANBAG within thirty (30) calendar days of the date upon which SANBAG notifies Omnitrans of its intention to rely upon any such report or information.

#### 1.4 Authorized Acquisition Costs

1.4.1 In determining whether to enter into a negotiated purchase of any Alignment Property, SANBAG shall have the exclusive authority to agree to a purchase price; provided, however, that Omnitrans shall be required to pay, at SANBAG's sole election, either to the property/business' owner or to reimburse SANBAG for the entire cost of any such purchase, but only to the extent the purchase price does not exceed the greatest of the following: (i) the value for an Alignment Property as established by a competent appraisal; (ii) an amount, which does not exceed the appraised value for an Alignment Property plus twenty percent (20%) of such appraised value; (iii) an amount which is not more than fifty-thousand dollars (\$50,000) more than the appraised value for an Alignment Property or, to the extent that no appraisal exists, an amount which is not more than fifty-thousand dollars (\$50,000); or (iv) an amount approved by Omnitrans' Board of Directors (the "Authorized Acquisition Costs").

1.4.2 To the extent applicable, Authorized Acquisition Costs include negotiated payments which represent claims by businesses impacted by the Project, including but not limited to claims for loss of business goodwill, provided, however, that Omnitrans shall only be responsible for such payments to the extent that the payment is in an amount approved by Omnitrans' Board of Directors or, alternatively, to the extent that both (A) the owner establishes, to the reasonable satisfaction of SANBAG, that (i) the loss is caused by the taking of the Acquisition Property or the injury to the remainder, (ii) the loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving goodwill, (iii) compensation for the loss will not be included in payments under Section 7262 of the California Government Code, and (iv) compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner, and (B) such payments represent (i) a value for such business losses, as established by a competent appraisal obtained by SANBAG and/or Omnitrans, (ii) an amount which does not exceed such appraised value for such business losses plus twenty percent (20%) of such appraised value, (iii) an amount which is not more than fifty-thousand dollars (\$50,000) more than such appraised value for such business losses or, to the extent that no such appraisal exists, an amount which is not more than fifty-thousand dollars (\$50,000).

1.4.3 To the extent practicable, Authorized Acquisition Costs shall be paid directly by Omnitrans to the property owner, business owner, or other claimant. To the extent direct payment by Omnitrans is not practicable, as determined by SANBAG, SANBAG shall make such payments, subject to reimbursement by Omnitrans as described in Section 1.6 below. SANBAG shall bear no responsibility or liability for any late payment or nonpayment of any such amount by Omnitrans.

1.5 Failure to Obtain Negotiated Purchase. Subject only to Omnitrans' obligations under this Agreement, including, without limitation, the obligation to promptly pay for and/or reimburse SANBAG for Authorized Acquisition Costs and other amounts set forth in this Agreement, SANBAG shall exercise reasonable diligence to obtain a negotiated purchase of any Alignment Property in compliance with state and federal law. Should SANBAG fail to obtain a negotiated purchase, it is intended by the parties that SANBAG shall analyze the propriety of acquiring the property through eminent domain and, in the event SANBAG concludes that eminent domain is proper, SANBAG shall proceed with the formal process of condemnation in accordance with the Acquisition Regulations.

1.6 Reimbursement for Real Property Costs and Acquisition Services Costs. Pursuant to the terms of this Section, Omnitrans shall reimburse SANBAG for one hundred percent (100%) of the authorized or approved costs that SANBAG incurs, which includes, but is not limited to: (i) the costs of

acquiring the Alignment Property, including, without limitation, any Authorized Acquisition Costs paid initially by SANBAG, payments for relocation assistance pursuant to state and/or federal law, and/or any award made to any property owner, business owner, or other party in any condemnation action, whether by judgment or other order of the court; (ii) Authorized Consultant Costs (as defined in Section 1.6.2 below), and (iii) other direct costs. SANBAG shall determine what constitutes the appropriate scope of services needed for performance of its obligations under this Agreement. SANBAG will exercise reasonable diligence in approving invoices and reimbursement claims for services. The total amount estimated to be reimbursed under this Agreement by Omnitrans is nine-million, seven-hundred eighty-two thousand dollars (\$9,782,000), divided as follows: six-million thirty-two thousand dollars (\$6,032,000) for real property acquisition and any business claims, two-million five-hundred thousand dollars (\$2,500,000) for legal counsel, one-million one-hundred thousand dollars (\$1,100,000) for fees from consultants, and one-hundred fifty-thousand (\$150,000) for SANBAG staff time.

1.6.1 Acquisition Costs. For any negotiated purchase, Omnitrans shall only be responsible to pay amounts which do not exceed the Authorized Acquisition Costs. Should SANBAG desire to acquire an Alignment Property at a price that exceeds the Authorized Acquisition Costs, SANBAG shall be responsible for paying the difference between the Authorized Acquisition Costs and the agreed-upon price. For any acquisition made through an eminent domain proceeding that does not result in a negotiated purchase (i.e., an eminent domain proceeding that proceeds to a judgment in condemnation), Omnitrans shall be responsible for the entire amount of the condemnation award, including, without limitation any award of litigation expenses, costs, and/or interest.

1.6.2 Alignment Property Acquisition and Relocation Services Costs, Reimbursement. SANBAG shall select all consultant(s) and legal counsel ("Consultant") necessary to assist it with Alignment Property acquisitions and/or relocation. Should SANBAG select a Consultant, Omnitrans shall reimburse SANBAG for all Consultant costs, fees, and charges incurred by SANBAG or related to SANBAG's purchase of any Alignment Property and performance under this Agreement. For purposes of this Section 1.6.2, "**Consultant costs**" shall be limited to the cost of services performed on a time-and-materials basis and those services enumerated in the scope of services for any acquisition and/or relocation services. As of the Effective Date, the Parties understand and agree that the estimated Consultant costs, plus SANBAG staff time is three-million, seven-hundred fifty-thousand dollars (\$3,750,000) ("Authorized Consultant Costs"). To the extent SANBAG incurs any additional Consultant costs that exceed the Authorized Consultant Costs without first obtaining prior approval of the Omnitrans Board of Directors, Omnitrans shall not be required to reimburse SANBAG for such costs unless such costs are approved by Omnitrans' Board of Directors. Omnitrans shall deposit three-hundred thousand dollars (\$300,000) with SANBAG, upon approval of this Agreement, which shall be applied to the Authorized Consultant Costs. Omnitrans shall replenish such deposit at the request of SANBAG at any time that such funds then held by SANBAG for Authorized Consultant Costs equal one-hundred thousand dollars (\$100,000) or less.

1.6.3 Project Coordination Meetings. Omnitrans and SANBAG shall meet for project coordination meetings as frequently as necessary for the successful completion of terms of this agreement. It is estimated that the meetings will be weekly, but can occur with greater or lesser frequency if needed.

1.6.4 Submission of Invoices. SANBAG shall submit to Omnitrans a monthly, itemized statement that indicates costs, fees, and other charges that SANBAG incurs. The statement shall describe the amount of services and supplies provided since the initial commencement date, or since the start of the subsequent billing periods, as appropriate, through the date of the statement.

1.6.5 Payment of Invoices. Omnitrans shall pay all invoices the first Thursday of each month if SANBAG submits the invoice, and Omnitrans approves the same, prior to the Monday preceding the first Thursday of each month. Omnitrans shall not unreasonably withhold payment and shall promptly pay any undisputed amounts. Should Omnitrans dispute any portion of an invoice, it must deliver written notice thereof by the first Wednesday of each month and such written notice shall reasonably describe the amount withheld and the reason therefore; provided, however, that Omnitrans shall not be entitled to dispute the amount of a condemnation award or any item previously approved by Omnitrans. In the event of any such dispute, the Parties shall resolve the dispute pursuant to Section 1.9 below. Failure of Omnitrans to timely deliver notice of a disputed reimbursement or payment as required in this Section 1.6.5 shall be deemed its approval of such payment or reimbursement

1.6.6 Late Payment of Invoices. If Omnitrans fails to promptly reimburse SANBAG and/or pay invoices as required under Section 1.6.5 above or otherwise under this Agreement, a late payment charge equal to five (5%) per annum on the reimbursement/invoiced amount shall be immediately due and payable.

1.6.7 No Guaranty on Costs. The Parties agree that the estimates of the Consultant costs and the real property acquisition costs for the Alignment Property represent the good faith attempt of the Parties to estimate such costs and Omnitrans' payment and reimbursement obligations hereunder. Notwithstanding the foregoing, but subject to Omnitrans' approval rights as set forth in this Agreement for amounts in excess of such estimates, the Parties acknowledge and agree that (i) such estimates are not a cap or guaranty on the amount of Consultant costs and real property acquisition costs that will be incurred under this Agreement and relating to the acquisition of the Alignment Property; and (ii) it is the express intent of the Parties that SANBAG be fully reimbursed for its costs incurred in performing its obligations under this Agreement in support of the Project.

## 1.7 Indemnification.

1.7.1 Neither SANBAG nor any board member, officer, employee, representative, agent, or consultant thereof is responsible for any loss, cost, expense, claim, suit, action, proceeding, injury, damage, or liability occurring by reason of, arising out of or relating to (i) the Project (other than the willful misconduct or gross negligence of SANBAG in the performance of its obligations under this Agreement); (ii) anything relating to the acquisition of any Alignment Property; (iii) any act, error or omission of Omnitrans under or in connection with any work, authority, or jurisdiction conferred upon Omnitrans or arising under this Agreement; or (iv) the condition of any Alignment Property, including its suitability or adequacy for the Project and any site conditions thereof, including, without limitation, any environmental conditions or hazardous materials. It is understood and agreed that, Omnitrans will fully defend, indemnify, and save harmless SANBAG and all of its board members, officers, employees, representatives, agents and consultants from and against all loss, cost, expense, claim, suit, action, proceeding, injury, damage, or liability of every name, kind and description brought forth under, including, but not limited to, tortious, contractual, inverse condemnation, or other theories or assertions of liability occurring by reason of, arising out of or relating to each and every of the items described in clauses (i)-(iv), inclusive, of this Section 1.7.1. The sole exception to Omnitrans' obligation to indemnify under this Section 1.7.1 shall be for acts of gross negligence or willful misconduct of SANBAG, its board members, officers, employees, representatives, agents, or consultants.

1.7.2 Neither Omnitrans nor any board member, officer, employee, representative, or agent, or consultant thereof is responsible for any loss, cost, expense, claim, suit, action, proceeding, injury, damage, or liability occurring by reason of, arising out of or relating to the willful misconduct or grossly negligent acts, errors or omissions of SANBAG in the performance of its obligations under this Agreement. It is understood and agreed that, SANBAG will fully defend, indemnify, and save harmless

Omnitrans and all of its board members, officers, employees, representatives, agents and consultants from and against all loss, cost, expense, claim, suit, action, proceeding, injury, damage, or liability of every name, kind and description brought forth under, including, but not limited to, tortious, contractual, or other theories or assertions of liability occurring by reason of, arising out of or relating to the willful misconduct or grossly negligent acts, errors or omissions of SANBAG in the performance of its obligations under this Agreement. SANBAG's obligation to indemnify under this Section 1.7.2 shall not extend to acts of negligence or willful misconduct of Omnitrans, its board members, officers, employees, representatives, agents, or consultants.

## 1.8 Audit and Inspection of Records.

1.8.1 The Parties agree that their respective records, which shall include, but not be limited to, Alignment Property files, accounting records, written policies and procedures, public bid documents, engineering and construction contracts, consultant contracts and payment history, contract files (including plans and specifications), original estimates, correspondence, change order files (including documentation covering negotiated settlements), invoices, and any other supporting evidence relied upon to substantiate charges related to the Project (collectively referred to as the **"Records"**), shall be open to inspection and subject to audit and reproduction by each Parties' auditors or other authorized representatives at all reasonable times, in order for the Parties to enforce their rights under this Agreement and permit evaluation of expended costs; provided, however, that each Party may restrict or prohibit access to, and the other Party shall have no right to review, attorney-client privileged communications and may require the execution of reasonable confidentiality agreements relating to other Records of a confidential or sensitive nature. The cost of said audit shall be at the expense of the Party requesting the audit.

1.8.2 Except as set forth in Section 1.8.1, the Parties, through any of their duly authorized representatives, upon providing at least forty-eight (48) hours prior written notice, shall be afforded access to all of the Records of the other related to the Project during normal business hours and shall be allowed to interview any employee, consultant or contractor of the other, subject to reasonable limitations, throughout the term of this Agreement.

1.8.3 Except as set forth in Section 1.8.1, information contained in the Records or other matters discovered during such audits or inspections shall not be disclosed to third parties unless required by law or unless otherwise resulting from or related to the pursuit of any remedies or the assertion of any rights by the Parties hereunder.

1.8.4 All Records pertaining to an Alignment Property must be retained by the Parties for three (3) years, or for any longer period required by law, following the complete fulfillment and satisfaction by the Parties of all commitments made and undertaken pursuant to this Agreement.

## 1.9 Dispute Resolution.

1.9.1 Negotiation. In the event of a dispute, claim or controversy arising from or in relation to this Agreement, the Parties agree to undertake good faith attempts to resolve said dispute, claim or controversy within seven (7) calendar days after the receipt of written notice from the Party alleging that a dispute, claim or controversy exists. The Parties additionally agree to cooperate with the other Party in scheduling negotiation sessions. However, if said matter is not resolved within thirty (30) calendar days after conducting the first negotiating session, either Party may then request that the matter be submitted for mediation pursuant to Section 1.9.2 below.

1.9.2 Mediation. If either Party, in accordance with Section 1.9.1 above, requests that an unresolved dispute, claim or controversy be submitted to mediation, the Parties agree first to undertake good faith efforts to settle the dispute through mediation administered by JAMS pursuant to its Comprehensive Mediation Rules and Procedures.

1.9.3 Legal Action. Compliance with the provisions of this Section shall be a condition precedent to any legal action, provided that nothing herein shall limit the Parties' right to terminate this Agreement pursuant to Sections 1.10, 1.11.1 and 1.11.2.

1.9.4 Allocation of Fees and Costs. The Parties agree to share the fees of the mediator, and all costs associated with mediation; provided, however, each Party shall be responsible for its own legal costs, including attorneys' fees and the costs associated with experts.

#### 1.10 Default.

1.10.1 Notice of Default. Failure or delay by either Party to perform any material term or provision of this Agreement shall constitute a default under this Agreement; provided, however, that if the Party who is otherwise claimed to be in default by the other Party commences to cure, correct or remedy the alleged default within thirty (30) calendar days after receipt of written notice specifying such default and thereafter diligently undertakes efforts to complete such cure, correction or remedy, such Party shall not be deemed to be in default hereunder; provided, further, that defaults relating to nonpayment or non-reimbursement shall only have a cure period of ten (10) calendar days and may not be extended as set forth in the preceding proviso. The Party claiming that a default has occurred shall give written notice of default to the defaulting Party, specifying the deficiencies causing the alleged default. Delay in giving such written notice shall not constitute a waiver of any default nor shall it change the time of default; provided, however, the non-defaulting Party shall have no right to exercise any remedy for a default hereunder without first delivering the written default notice as specified herein.

1.10.2 Failure to Cure. In the event that the defaulting Party fails to (i) cure a payment or reimbursement default within ten (10) calendar days following receipt of written notice or (ii) commence to cure, correct or remedy any other default within thirty (30) calendar days following receipt of written notice, or (iii) as to a default described in clause (ii), thereafter fails to diligently complete such cure, correction or remedy, a breach of this Agreement shall be deemed to have occurred. In the event of a breach, the non-defaulting Party may terminate this Agreement through a written notice of termination. Disputes regarding the facts that may have given rise to termination under this Section shall be subject to the dispute resolution provisions provided in Section 1.9 above, but the right to terminate for such reason shall not be subject to review.

1.10.3 Remedies. In addition to the right to terminate this Agreement as set forth in Section 1.10.2, the non-defaulting Party shall have the right to seek and obtain damages, specific performance and all other rights and remedies under law or in equity.

#### 1.11 Termination Other Than For Default

1.11.1 Termination of Funding. Omnitrans shall retain its right to terminate this Agreement at any time due to the lack of adequate federal or state funding or the lack of or denial of any required approval from any federal, state or local agency. In the event Omnitrans elects to terminate this Agreement pursuant to this Section 1.11.1, Omnitrans shall provide SANBAG written notice at least thirty (30) calendar days prior to its intent to terminate. Disputes regarding the facts that may have given rise to termination under this Section or the right of Omnitrans to terminate pursuant to this Section shall not be subject to the dispute resolution provisions provided in this Agreement. Regardless of funding



status, Omnitrans shall pay and reimburse SANBAG the following costs that SANBAG incurs: (i) Authorized Acquisition Costs incurred prior to the termination of this Agreement; (ii) Authorized Consultant Costs incurred prior to the termination of this Agreement; (iii) additional Consultant costs incurred by SANBAG following Omnitrans' termination of this Agreement for work including, but not limited to, abandoning any pending eminent domain matters and demobilization costs of the consultants, if any; (iv) costs SANBAG incurs following termination of this Agreement including, but not limited to, litigation costs and damages claimed by any property or business owner as a result of SANBAG's failure to complete the acquisition of any Acquisition Property, including claims related to the abandonment of any eminent domain proceeding; and (v) any additional costs that the Omnitrans' Board of Directors approves.

1.11.2 Termination for Convenience. Either Party shall retain the right to terminate this Agreement at any time, in its respective sole discretion. In the event a Party elects to terminate this Agreement pursuant to this Section 1.11.2, such Party shall provide the other Party written notice at least thirty (30) calendar days prior to its intent to terminate. Disputes regarding the facts that may have given rise to termination under this Section or the right of a Party to terminate pursuant to this Section shall not be subject to the dispute resolution provisions provided in this Agreement. In the event of a termination under this Section 1.11.2, Omnitrans shall pay and reimburse SANBAG the following costs that SANBAG incurs: (i) Authorized Acquisition Costs incurred prior to the termination of this Agreement; (ii) Authorized Consultant Costs incurred prior to the termination of this Agreement; (iii) additional Consultant costs incurred by following the termination of this Agreement for work including, but not limited to, abandoning any pending eminent domain matters and demobilization costs of the consultants, if any; (iv) costs SANBAG incurs following termination of this Agreement including, but not limited to, litigation costs and damages claimed by any property or business owner as a result of SANBAG's failure to complete the acquisition of any Acquisition Property, including claims related to the abandonment of any eminent domain proceeding; and (v) any additional costs that the Omnitrans' Board of Directors approves.

1.12 Changed Conditions. In the event that either Party to this Agreement, despite its best efforts, cannot, for reasons beyond the control of the Party, timely satisfy a contingency or condition required by this Agreement, that Party shall provide immediate written notification to the other Party within seven (7) calendar days after the occurrence of the event specifying the reasons for which the requirements cannot be met. As soon as practically possible thereafter, the Parties shall meet and confer in good faith to consider the changed conditions and the potentially adverse impacts upon this Agreement. Both Parties shall work in good faith to resolve the problem and if this meet-and-confer process results in a recommended restructured form of this Agreement, representatives of both Parties will recommend such changes as necessary to the individual, Party or governing body authorized to amend this Agreement. Any approval of such restructured Agreement shall be subject to the provisions of Section 2.2 below. The foregoing provisions shall not apply to any payment or reimbursement obligation of Omnitrans.

1.13 Attorneys' Fees. Except as otherwise expressly provided herein, each Party who files any action or brings any action or proceeding against the other arising from this Agreement, seeks resolution of disputes pursuant to this Agreement or is made a party to any action or proceeding brought by any other person or governmental entity, shall bear its own costs and fees.

1.14 Laws and Regulations. Each Party shall keep itself fully informed of and in compliance with all local, state and federal laws, rules and regulations in any manner affecting the performance of this Agreement or any work related to acquisition of an Alignment Property and shall give all notices required by law. Each Party shall be liable for violations by such Party of such laws and regulations in connection with this Agreement or any work related to acquisition of an Alignment Property. If either Party performs any of its obligations hereunder knowing that its actions are contrary to such laws, rules and regulations

and without giving written notice to the other, the violating Party shall be solely responsible for all costs arising therefrom.

1.15 Approvals. Approvals required of Omnitrans or SANBAG, or any officers, agents or employees of either Party, shall not be unreasonably withheld and approval or disapproval shall be given within a reasonable time; provided, however, if specific time periods have been provided for in this Agreement, such time periods shall be controlling.

## **2. Miscellaneous Terms.**

### **2.1 Notices, Demands and Communications between the Parties.**

2.1.1 Formal notices, demands and communications between Omnitrans and SANBAG shall be deemed sufficiently given if: (i) dispatched by registered or certified mail via the United States Postal Service, postage prepaid, return receipt requested, as designated in this Section; or (ii) by messenger service for immediate personal delivery; or (iii) by electronic transmittal, including fax transmissions with telephonic verification receipt. Such written notices, demands and communications may be sent in the same manner to such other addresses as either Party may from time to time designate by written notice to the other Party.

2.1.2 All notices, demands and communications shall be sent, as follows:

#### **TO OMNITRANS:**

Omnitrans  
Attention: CEO/General Manager  
1700 West Fifth Street  
San Bernardino, CA 92411

Copy to:  
Omnitrans  
Attention: Chief Financial Officer  
1700 West Fifth Street  
San Bernardino, CA 92411

Copy to:  
Best Best & Krieger LLP  
Attention: Special Counsel  
3500 Porsche Way, Suite 200  
Ontario, CA 91764

#### **TO SANBAG:**

SANBAG  
Attention: Mitch Alderman  
Director of Transit & Rail Programs  
1170 West 3<sup>rd</sup> Street, 2<sup>nd</sup> Floor  
San Bernardino, CA, 92410

2.1.3 Notices that are dispatched by registered or certified mail through the United States Postal Service shall be deemed to be received, regardless of whether or when any return receipt is received by the sender or the date set forth on such return receipt, five (5) calendar days after deposit with the United States Postal Service. Notices that are dispatched by messenger for immediate personal delivery services shall be deemed received upon the day dispatched. Notices dispatched by express delivery services shall be deemed received upon execution of the delivery receipt by the Party receiving such notices. Notices dispatched through electronic transmittals shall be deemed received upon telephonic verification of such receipt.

2.2 Amendment. This Agreement may be amended at any time by the mutual consent of the Parties by an instrument in writing signed by both Parties.

2.3 Further Actions and Instruments. Each of the Parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement and the satisfaction of the conditions of this Agreement.

2.4 Counterparts. This Agreement may be signed in counterparts, each of which shall constitute an original.

2.5 Third Party Beneficiaries. This Agreement and the performance of Omnitrans' and SANBAG's obligations hereunder are for the sole and exclusive benefit of Omnitrans and SANBAG. No person or entity who or which is not a signatory to this Agreement shall be deemed to be benefited or intended to be benefited by any provision hereof, and no such person or entity shall acquire any rights or causes of action against either Omnitrans or SANBAG hereunder as a result of Omnitrans' or SANBAG performance or nonperformance of their respective obligations under this Agreement.

2.6 Governing Law. This Agreement shall be governed by the laws of the State of California without regard to conflicts of laws principles. This Agreement shall be deemed to have been made in the County of San Bernardino, California, regardless of the order of the signatures of the Parties affixed hereto. Any litigation or other legal proceedings which arise under or in connection with this Agreement shall be conducted in a federal or state court located within or for San Bernardino County, California. The Parties consent to the personal jurisdiction and venue in federal or state court located within or for the County of San Bernardino, California and hereby waive any defenses or objections thereto including defenses based on the doctrine of forum non conveniens.

2.7 Construction; References; Captions. Since the Parties or their agents have participated fully in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days or period for performance shall be deemed calendar days and not work days, except as otherwise specified in this Agreement. All references to SANBAG include all officials, officers, employees, personnel, agents, volunteers, contractors, subcontractors, consultants, and subconsultants of SANBAG, except as otherwise specified or limited in this Agreement. All references to Omnitrans include its officials, officers, employees, personnel, agents, volunteers, contractors, subcontractors, and consultants and subconsultants, except as otherwise specified or limited in this Agreement. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.

2.8 Waiver. No delay or omission in the exercise of any right or remedy of a non-defaulting Party on any default shall impair such right or remedy or be construed as a waiver. Either Parties' consent or approval of any act by the other Party requiring its consent or approval shall not be deemed to waive or render unnecessary its consent to or approval of any subsequent act of the other Party. Any waiver by either Party of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of this Agreement.

2.9 Rights and Remedies are Cumulative. Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the Parties are cumulative and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party. All representations, warranties and promises to indemnify shall survive the termination, abandonment, or completion of this Agreement.

2.10 Legal Counsel. Each Party acknowledges that: (i) it has read this Agreement; (ii) it has had the opportunity to have this Agreement explained to it by legal counsel of its choice; (iii) it is aware of the content and legal effect of this Agreement; and (iv) it is not relying on any representations made by the other Party or any of the employees, agents, representatives, or attorneys of the other Party, except as expressly set forth in this Agreement.

2.11 Severability. In the event that any one or more of the phrases, sentences, clauses, paragraphs, or sections contained in this Agreement shall be declared invalid or unenforceable by a valid judgment or decree of a court of competent jurisdiction, such invalidity or unenforceability shall not affect any of the remaining phrases, sentences, clauses, paragraphs, or sections of this Agreement which are hereby declared as severable and shall be interpreted to carry out the intent of the parties hereunder.

2.12 Binding Effect. The terms of this Agreement shall inure to the benefit of, and shall be binding upon, each of the Parties and their respective successors and assigns.

2.13 Authorized Representatives. The person or persons executing this Agreement on behalf Omnitrans and SANBAG warrants and represents that he/she has the authority to execute this Agreement on behalf of that Party and that he/she has the authority to bind that Party to the performance of its obligations hereunder.

2.14 Entire Agreement. This Agreement constitutes the entire and integrated agreement of Omnitrans and SANBAG with respect to the subject matter hereof and supersedes any and all prior and contemporaneous oral or written negotiations, representations or agreements.

**[SIGNATURES ON THE FOLLOWING PAGE]**

**SIGNATURE PAGE TO COOPERATIVE AGREEMENT**

**SAN BERNARDINO ASSOCIATED  
GOVERNMENTS**

**OMNITRANS**

By: \_\_\_\_\_  
Brad Mitzelfelt  
President

By: \_\_\_\_\_  
Milo Victoria  
CEO/General Manager

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

APPROVED AS TO LEGAL FORM:

APPROVED AS TO LEGAL FORM:

Nossaman LLP

BEST BEST & KRIEGER LLP

By: \_\_\_\_\_  
Corey A. Boock  
Special Counsel

By: \_\_\_\_\_  
Special Counsel

ATTEST:

ATTEST:

By: \_\_\_\_\_  
Vicki Watson  
Clerk of the Board

By: \_\_\_\_\_  
Board Secretary